IN THE HIGH COURT OF JUDICATURE FOR

RAJASTHAN AT JODHPUR

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O R D E R

Dwarka Prasad Jaiman
Vs.
The State of Rajasthan & Ors.

S.B. CIVIL WRIT PETITION NO.5782/1993 UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA.

DATE OF ORDER :: 05th October, 2006

PRESENT

HON'BLE SHRI JUSTICE MOHAMMAD RAFIQ

REPORTABLE

Mr.Kuldeep Mathur, Advocate for the petitioner.
Mr.Rameshwar Dave, Dy. Govt. Advocate for respondents.

BY THE COURT

The petitioner in this writ petition has challenged the orders Annexures-4, 5 and 7, all dated 08th October, 1993,

passed by Excise Commissioner, Udaipur.

The factual matrix of the case are that the petitioner was appointed as Stenographer Gr.II as a consequence of regular selection through Rajasthan Public Service Commission (for short 'RPSC') on 14th August, 1984 in the Excise Department of the State. The RPSC on 04th April, 1987 invited applications from the eligible candidates for appointment on the post of Personal Assistant (Hindi) and Personal Assistant (English) in accordance with the Rajasthan Subordinate Offices Ministerial Staff Rules, 1957 (for short 'the Rules of 1957'). It would be evident from advertisement Annexure-1 that this was a qualifying examination for the purpose of promotion on the aforementioned posts and only such of the candidates who were working with the Government were eligible to apply for and appear in the same. The petitioner appeared and successfully passed the qualifying examination conducted by the RPSC. Accordingly, his name was recommended to the Department of Personnel & General Administrative Reforms, Government of Rajasthan, Jaipur. The Department of Personnel

recommended his name for appointment on the post of Personal Assistant vide communication dated 28th April, 1988 to the Commissioner Excise, Udaipur. The case of the petitioner is that he stood at serial No.1 in the panel prepared by the Commission from amongst the candidates. The Commissioner Excise vide his letter dated 30th August, 1988 appointed the petitioner as Personal Assistant in the pay scale of Rs.1400-2825 and accordingly the petitioner joined his duties on 02nd September, 1988. According to the petitioner, his appointment on the post of Personal Assistant was not by way of promotion from the post of Stenographer Gr.II.

One Kishan Lal filed a writ petition being S.B. Civil Writ Petition No.2875/1988 titled as Kishan Lal Vs. State of Rajasthan & Ors. before this Court. In this writ petition, it was contended that only one post was vacant for appointment on the post of Personal Assistant by promotion and the respondents could not fill up those posts by direct recruitment. This Court by its judgment dated 29th July, 1993 though upheld validity of the order dated 30th August, 1988 appointing the

petitioner on the post of Personal Assistant but observed that since promotional posts have now become available with the respondent Department, they should now proceed to hold Departmental Promotion Committee to consider the candidature of said Shri Kishan Lal and others. The petitioner was surprised and shocked to receive the order dated 08th October, 1993 whereby the Excise Commissioner cancelled the order of petitioner's appointment on the post of Personal Assistant dated 30th August, 1988 and after considering candidature of the petitioner by the D.P.C. constituted in pursuance of the judgment dated 29th July, 1993 promoted the petitioner by order dated 08th October, 1993 on the post of Personal Assistant against the vacancies of the year 1992-93. Two more orders were passed of the same date dated 08th October, 1993. One of these orders was passed to promote Kishan Lal Manaria on the post of Personal Assistant against the vacancy of the year 1989-90 and another order was passed to promote one Jagdish Chandra Sharma on the post of Personal Assistant against the vacancy of the year 1984-85 who was earlier appointed on compassionate basis by an order dated

25th October, 1989 against the vacancy of the year 1989-90. In the background of these facts, the present writ petition has been filed with the aforementioned prayers.

Learned counsel for the respondents have contested the petition by way of filing reply to the writ petition. According to the respondents, the RPSC recommended name of the petitioner on his passing the required recruitment test in accordance with the provisions of Rule 7(1)(b) of the Rules of 1957 and accordingly he was posted on the post of Stenographer Gr.II by order dated 14th August, 1943. It has been admitted that the RPSC by their communication dated 28th April, 1988 subsequently sent a merit list of the selected candidates for appointment on the post of Personal Assistant in which the name of the petitioner was shown at serial No.3 and accordingly the petitioner was promoted on the post of Personal Assistant by order dated 30th October, 1988.

One Kishan Lal Manariya challenged the promotion of the petitioner on the premise that there was only one vacancy of

Personal Assistant which was required to be filled up as per Rule 15 of the Rules of 1957 in promotion quota. He relied upon a clarification issued issued by the Department of Personnel on 26th November, 1988 which has been placed on record as Annexure-R/2. According to this circular, 50% posts of Personal Assistant were required to be filled up from amongst the Stenographers on the basis of seniority as per Rule 7(1)(d) and remaining 50% posts of Personal Assistant were to be filled up on the basis of select list of qualifying examination from amongst the Stenographers working on the basis of marks secured in such examination. This Court in its judgment dated 29th July, 1993 found that Kishan Lal Manariya (the petitioner in that case) was senior to the petitioner and therefore meeting of the Departmental Promotion Committee was required to be convened to consider the case of promotion of Shri Manariya and another eligible candidates for regular promotion. Appointment of the petitioner on the post of Personal Assistant was made on temporary basis. This was not filled up by direct recruitment but was required to be filled up on the basis of seniority and passing of the qualifying

examination. The case of all those who were eligible was required to be considered and accordingly promotions orders in respect of suitable persons were passed. It is therefore prayed that the writ petition is dismissed and the same is liable to be rejected.

On careful examination of the advertisement Annexure-1 dated 04th April, 1987, it would become evidently clear that this was a qualifying examination conducted by RPSC in accordance with the provisions contained in Rule 15(7) of the Rules of 1957. The aforesaid Rule which was then in existence was later deleted vide Notification No.F. 3(71)DOP/A-II/84 dated 10th August, 1989. Rule 15(7) (supra) for the facility of reference is reproduced as under:-

> "(7) No Stenographer shall be promoted [More than 5% of the vacancies of the post of] Personal Assistant unless he has passed Personal Assistant qualifying examination held by the Commission at x[100 words per minute in English or in Hindi dictation] *[which will carry 100 marks] and must have put in four years service and should be substantive on the post of Stenographer. Provided that the persons who are above 45 years of age and are otherwise due for

> promotion shall not be required to pass the qualifying examination."

Corresponding provision below Rule 7(1)(d) with regard to method of recruitment then available was also substituted by same Notification dated 10th August, 1989 (supra). The said provision then available read as under:-

> "(i) 50 percent of the vacancies of Personal Assistant in a particular year, shall be filled in by promotion on the basis of seniority-cum-merit from amongst the Stenographers +(who have passed the qualifying examination before 10.5.1978 or after 15.3.1978 or competitive examination before 15.3.1978 or have been exempted from appearing at the said examination under proviso (7) to rule 7 and) having a minimum seven years of service as Stenographer Grade, and ...."

The respondents have in their reply referred to the clarification issued by the Department of Personnel vide their letter dated 26th November, 1988 which has been addressed to Excise Commissioner, Udaipur. It has been stated therein that in this clarification reference has been made to the proviso to Rule 7(1)(d) reproduced hereinabove is provided that 50%

vacancies shall be filled in on the basis of seniority-cum-merit and remaining 50% also for promotion on the basis of qualifying examination from amongst those working in the department was made. It would be thus evident that the recruitment of the petitioner as originally made on the basis of advertisement dated 04th April, 1987 was in fact based on his passing the qualifying examination conducted by RPSC under Rule 15(7) of the Rules of 1957. This would be clear from the order dated 30th August, 1988, wherein it has been stated that the petitioner had appeared and succeeded in the qualifying examination conducted by RPSC under Rule 15(7) of the Rules of 1957, in which he has secured highest marks therefore he was appointed in the scale of 1400-2850 on the post of Personal Assistant on temporary basis. It is however noteworthy to state that when the earlier writ petition was contested by the respondents before this Court, correct facts were not placed before the Court by the respondents and an impression was imparted to the Court that the appointment of the petitioner on the post of Personal Assistant made vide order dated 30th August, 1988 was in fact by way of direct

recruitment. This would be evident from the following extract from the judgment:-

> "7. It appears that under some misconception the RPSC held the qualifying examination for filling up the post of Personal Assistant, treating it as a Promotional post even though it was only a post for direct recruitment and that too reserved for SC/ST quota and the name of the petitioner was forwarded to RPSC by the officials of the Excise Commissioner, Udaipur vide Ann.R.3. But, as already stated above, this was not at all correct and actually the post had to be filled up by direct recruitment. It appears that the post was only temporarily filled up by direct recruitment from the list of candidates who had passed the qualifying examination on the basis of highest marks obtained at the examination. In my opinion, the petitioner cannot claim to be appointed against direct recruitment post and can lay claim only to a promotional post. It has been stated at bar by respondent No.3 D.P. Jaiman, who has been identified by Shri M.S. Singhvi, that now promotional post of Personal Assistant has been created in the Department and the petitioner can now lay his claim to this post. Shri Jaiman further stated that D.P.C. was to be held but because of some reasons D.P.C. could not be held. The respondents may now hold D.P.C. within three months so that candidature of the petitioner alongwith all other eligible candidates is considered for promotion in accordance with the Rules."

It is not clear from the records whether the private respondents appeared in the qualifying examination conducted by RPSC pursuant to the Notification dated 04th April, 1997. It is also not clear that they appeared and failed. It is however clear that none of them have asserted either in the proceedings of the present writ petition or in the earlier writ petition that they also appeared in the said qualifying examination and successfully passed the same. The petitioner had not only passed the said qualifying examination but also secured the highest marks in such qualifying examination as would be evident from the order of his promotion dated 30th August, 1988. There was a quota of 50% promotion by another stream of qualifying examination under Rule 15(7) (supra) therefore, the petitioner came to be promoted on the post of Personal Assistant. The provisions then available provided for this special procedure because apart from 50% post by promotion on the basis of seniority-cum-merit remaining 50% was earmarked purely based on the performance of the candidates, who were required to prove their worth in an open competition which was categorized as qualifying examination for the purpose of

proviso to Rule 7(1)(d) read with Rule 15(7) of the Rules of 1957. Description of the promotion as temporary in the order dated 30th August, 1988 was a misnomer although when the petitioner had successfully passed the qualifying examination conducted by RPSC and having secured highest marks was promoted on the post of Personal Assistant as per the scheme of the Rules then in vogue. It was for all practical purposes as substantive order of promotion. It appears that the Rule relating to seniority in the Rules of 1957 namely Rule 27 provided for determination of seniority from the date of confirmation and initial appointment was made under the rules by following the regular mode of recruitment through RPSC were described as temporary. None the less, even such an appointment would for all purposes be a substantive appointment. If there was 50% quota of promotion through the scheme of qualifying examination under Rule 15(7), interse seniority of the petitioner Kishan Lal Manariya and Jagdish would not have any relevance and on that basis the promotion of the petitioner which was actually on the basis of his performance in the qualifying examination conducted by RPSC

could not be questioned. The respondents could not undo such a substantive promotion which they have done by misconstruing the Rules.

In the result, the writ petition is allowed. The order Annexure-4 dated 08th October, 1993 whereby earlier order of promotion of the petitioner dated 30th August, 1988 was superseded is quashed and set aside. The petitioner shall be deemed to have continued on the post of Personal Assistant by order dated 30th August, 1988 as if such order was never superseded. He shall also be entitled to consequential benefits. Respondents are directed to make compliance of this order within a period of three months from the date a copy of this judgment is served upon them. There shall be no order as to costs.

[MOHAMMAD RAFIQ],J.

A.K. Chouhan/-